

FARMERS UNION CENTRAL EXCHANGE, INC.

IBLA 85-392

Decided June 26, 1985

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, imposing assessment for incidents of noncompliance with regulations governing oil and gas lease W-23819.

Vacated in part, affirmed in part.

1. Oil and Gas Leases: Civil Assessments and Penalties

Failure to have more than one valve effectively sealed, as required by 43 CFR 3162.7-4(b)(1), requires an assessment of \$ 250 for each unsealed valve, in accordance with 43 CFR 3163.3(j), because each failure is a specific instance of noncompliance.

APPEARANCES: Corinne Courtney, Esq., Billings, Montana, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Farmers Union Central Exchange, Inc. (CENEX) has appealed the January 14, 1985, decision of the Wyoming State Office, Bureau of Land Management (BLM), imposing a \$ 1,500 assessment for six instances of failure to maintain effective seals as required by 43 CFR 3162.7-4. The decision resulted from a technical and procedural review, in accordance with 43 CFR 3165.3, of a December 18, 1984, letter from the Buffalo Resource Area, BLM, assessing \$ 250 per violation in accordance with 43 CFR 3163.3(j) for violations detected in a December 13, 1984, inspection of CENEX's oil and gas lease W-23819 facility in Campbell County, Wyoming.

BLM's answer filed May 17, 1985, states that the Board should vacate those portions of the January 14, 1985, decision imposing \$ 1,000 in assessments for failure to install and maintain sealable valves because the decision itself indicated the valves could have been sealed. We agree. The decision reads: "Regarding the sealability of the equalizer line between tanks, technically, the butterfly valve could have been effectively sealed." (Emphasis in original.) We will therefore vacate that portion of the decision which held assessments were appropriate for the four valves that "should have been sealable."

[1] The Notice of Incidents of Noncompliance Detected states: "There were no seals on * * * sales line on tank #7984." In its request for a technical and procedural review CENEX stated: "The regulations do not allow

multiple assessments for unsealed valves." To this objection the January 14, 1985, decision responded:

While the regulations appear to suggest that the assessment for noncompliance would be applied once, regardless of the number of ineffective seals, the regulatory interpretation and procedures written for the assessments are clear. At the time of the subject inspection, the procedures were to apply the assessment for noncompliance for each instance of a violation. The assessment for noncompliance is also to be levied when an "appropriate" valve is found to be unsealable. In other words, if a valve which must be sealed during a particular phase of operation cannot be effectively sealed, a violation exists. Therefore, it is appropriate to assess the \$ 250 under 43 CFR 3163.3(j) for each seal violation.

On appeal CENEX argues this is contrary to the plain language of the regulation. 43 CFR 3163.3(j) provides: "For failure to maintain effective seals required by the regulations in this part and by applicable orders and notices, or for failure to maintain the integrity of any seal placed upon any property or equipment by the authorized officer, \$ 250." CENEX maintains this language indicates BLM may assess \$ 250 for "failure to maintain effective seals," no matter how many seals, or for "failure to maintain the integrity of any seal" placed by an authorized officer. (Emphasis added.) In addition, it argues, the language of the regulation it was cited for violating, 43 CFR 3162.7-4(b)(1), supports this interpretation. That language reads: "All appropriate valves on lines entering or leaving oil storage tanks shall be effectively sealed during the production phase and during the sales phase." If it was intended that each unsealed valve was a separate violation, CENEX argues, this language would read "each appropriate valve" rather than "all

appropriate valves." CENEX also argues the purpose of 43 CFR 3163.3 to recover liquidated damages for the costs to the Government of noncompliance supports its view. The costs of the inspection and "of processing the paperwork involved in the issuance of an INC [Notice of Incident of Noncompliance] * * * will remain essentially the same no matter how many unsealed valves are discovered as a result of the inspection."

In answer BLM states 43 CFR 3163.3 provides amounts to be assessed "to cover loss or damage to the lessor from specific instances of noncompliance" and argues that because 43 CFR 3162.7-4(b)(1) requires "[a]ll appropriate valves" to be sealed, the failure to seal any valve is a specific instance of noncompliance. Its interpretation of the regulation is more reasonable, BLM argues, because otherwise an operator could have a number of valves unsealed on more than one occasion or at more than one facility and still be assessed only \$ 250. As for CENEX's argument based on the purpose of the regulation, BLM responds one of the purposes of the liquidated damages is to deter noncompliance and this purpose would not be served "if an operator knows he will be assessed only \$ 250 regardless of the number of noncomplying valves found during an inspection." The stated purpose of establishing amounts to be assessed where the actual amount of damage to the lessor is difficult or impracticable to ascertain is also served by its interpretation, BLM argues, because an inspector must collect evidence for each violation and others in BLM must review reports and issue notices and bills for each violation, so the costs for several violations would be higher than for one.

In response CENEX argues deterrence is the function of penalties, not liquidated damage assessments, as indicated in the preamble to the regulations, 49 FR 37361 (Sept. 211984), and the costs to be recovered are those associated with noncompliance of a particular kind at each inspection, not at more than one time or place, as argued by BLM. Reading the language of 43 CFR 3163.3(a)-(j), CENEX argues, makes clear each lettered subsection sets forth an "instance" for which a corresponding amount is the appropriate assessment. For 43 CFR 3163.3(a) the instance is "failure to comply with a written order"; for 43 CFR 3163.3(j) the instance is "failure to maintain effective seals." (Emphasis added.)

Although CENEX's arguments based on the language of the particular provisions of 43 CFR 3163.3 and 3162.7-4 it cites are plausible, the enforcement system created by the regulations would not be workable under its interpretation. Several provisions of 43 CFR 3163.3 set forth iterative or alternative kinds of activity, e.g., 3163.3(e) (failure to identify a well), 3163.3(f) (failure to install safety equipment), and 3163.3(g) (failure to exercise due care to prevent damage to surface or subsurface resources or surface improvements). There could, of course, be several instances of each of these failures, just as there could be several unsealed valves. We would not think it reasonable to have only one assessment even though more than one well was not identified, or more than one kind of safety equipment was lacking, or more than one kind of surface or subsurface resource or surface improvement was put at risk because of a failure to exercise due care. Similarly, we do not think it reasonable to regard several unsealed valves as only one instance of noncompliance, especially when each unsealed valve could cause a

separate problem. We therefore conclude the portion of the January 14, 1985, decision assessing \$ 250 for each of the two unsealed valves on the sales phase must be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 14, 1985, decision of the Wyoming State Office is vacated as to the \$ 1,000 assessed for unsealable valves and affirmed as to the \$ 500 for the two unsealed valves.

Will A. Irwin
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge

